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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LORETTA FIGUEROA,
Plaintiff and Appellant,
v.
PACIFIC DENTAL ASSOCIATES,
Defendant and Respondent.

A121610

(San Francisco City & County Super. Ct. No. CGC-07-459319)

Plaintiff Loretta Figueroa was employed as a dental hygienist by defendant Pacific Dental Associates (Pacific Dental). In 2004, Pacific Dental decided to reduce the time allotted to hygienists' routine teeth-cleaning sessions from 60 minutes to 50 minutes to enhance profitability. Believing that the reduction would reduce the quality of patient care, Figueroa resisted the change and was eventually fired. She filed an action against Pacific Dental, alleging that she was terminated because of her opposition to the change and that such a termination violated public policy. The trial court granted summary judgment against her claims, reasoning that the Business and Professions Code provisions relied on by Figueroa did not protect her conduct. We affirm.

I. BACKGROUND

Figueroa filed a complaint in June 2007, alleging a single cause of action for termination from employment in violation of public policy. The complaint alleged that Figueroa had worked for Pacific Dental, a San Francisco dental office, as a registered dental hygienist, beginning in 1991. In March 2004, Pacific Dental decided to increase the number of patients seen by its hygienists each day by reducing the time spent with

patients from an hour to 50 minutes. Figueroa "pointed out that this would not be enough time for some patients, but her concerns were ignored." There followed a debate about the new level of treatment and its disclosure to patients. As a result of her reluctance to go along with the policy, and her conduct in expressing that reluctance, Figueroa was fired. Figueroa alleged that Pacific Dental's conduct violated, "among other statutes, Business and Professions Code § 1680(q), which specifically forbids the discharge of an employee primarily based on the employee's attempt to comply or to aid in compliance with sound dental practices."

Pacific Dental moved for summary judgment in August 2007, arguing that the record demonstrated that Figueroa had not attempted to enforce compliance with dental disciplinary rules, as required by the Business and Professions Code[1] section 1680, subdivision (q), and that she was terminated for business reasons. In a declaration submitted in support of the motion, Pacific Dental's periodontist, Garry Rayant, stated that there had never been a professional disciplinary complaint or claim of malpractice against Pacific Dental during his tenure, which began in 1989.[2] Rayant said he had always found Figueroa's "attitude difficult and at times unacceptable." She questioned his diagnoses and treatments in a manner he believed to be inappropriate and made " 'editorial' " comments in patient charts. He complained about her conduct in writing in 1999. When no action was taken, he continued to work with her for several years without further formal complaint, although he saw little improvement in her deficiencies.

Rayant explained that by 2004, Pacific Dental's practice was booming, with a three-month waiting list, but unprofitable. The practice hired a consultant who proposed, in March 2004, "a restructured program [that would] run more efficiently which would reduce waiting times for patients, yet leave ample time for excellent patient care. One of the most critical changes required to increase efficiency was the shortening of routine cleaning appointments from 60 minutes to 50 minutes. Patients' [*sic*] whose conditions

[1] All statutory references are to the Business and Professions Code.

[2] This claim was not entirely true. One of the practice's dentists admitted in deposition that he had settled a malpractice claim approximately five years earlier.

required more than 50 minutes were either scheduled for 60 minute appointments or two 50 minute appointments (based on the best judgment of the dentist)." According to the consultant, "most dental offices in San Francisco had already switched to 50 minute appointments for most cleanings and had little trouble completing cleanings (called 'prophylaxis') according to the definition provided by the American Dental Association ('ADA')."

Rayant stated that Figueroa made clear she would not cooperate in the implementation of the program, in part because she believed routine prophylaxis should include an additional procedure, cleaning below the gum line, that was not included in the ADA definition. It was, however, included as an element of "prophylaxis" as defined by the insurer Delta Dental. Thereafter, Figueroa made notations in patient charts reflecting her dissent, but she never contended that the change was illegal or grounds for a disciplinary proceeding against Pacific Dental. By the time the change to 50-minute cleanings was implemented in November 2004, Figueroa had been given oral and written warnings about her conduct. The decision to terminate her was made in December 2004.

A declaration submitted by Pacific Dental's consultant confirmed his retention and the content of his recommendations, adding that "my understanding is that 50 minute appointments for regular cleanings are permitted by law when deemed appropriate by the treating dentist. If I believed there was even a remote possibility that 50 minute appointments were inconsistent with law, neither myself nor my firm would have suggested that any dental office have 50 minute appointments for regular cleanings." Declarations by other dentists in the Pacific Dental practice supported Rayant's contentions, declaring that Figueroa was fired because of her difficult attitude rather than her advocacy of better patient care.

In a declaration submitted in opposition, Figueroa stated that while she was criticized for her attitude early in her career with Pacific Dental, she had taken the comments to heart and changed her behavior. She had worked closely with several Pacific Dental dentists "without serious complaints" for the four years between 1999 and 2003. She confirmed the difference between the ADA and Delta Dental definitions of

"prophylaxis." In deposition excerpts, Figueroa testified that in November 2004, she began to write "ADA prophylaxis" in patient charts to distinguish the treatment she was providing in a 50-minute appointment, which did not include cleaning below the gum line, from the Delta Dental definition. Figueroa stated that in her view it was not the change, per se, that was improper but the failure expressly to inform patients, who would continue to assume they were getting a 60-minute cleaning. She had been forbidden by the Pacific Dental dentists from informing patients of the change. Figueroa believed the "sole reason" she was terminated was that she "advocated for better dental care for patients."

Figueroa also submitted the declaration of an expert in dental practice with experience in reviewing the treatment records of California dentists, Dr. Kevin Sheets. Sheets contended that the examples of allegedly improper patient file notations by Figueroa cited by Pacific Dental were not, in fact, improper. He did not address the controversy regarding the length of cleaning appointments or otherwise opine on the quality of the dentistry practiced at Pacific Dental.

The trial court granted Pacific Dental's motion for summary judgment. In its order, the trial court held that Figueroa "has not, and it appears to this Court that Plaintiff cannot, produce any admissible evidence that establishes that she ever engaged in any 'protected activity' that would trigger the duty not to retaliate contained in Business & Professions code section 1680(q). While plaintiff produced evidence that she expressed objections to the switch to 50 minute appointments for ordinary cleanings . . . , she produced no evidence that she ever told [Pacific Dental] that she believed the change was illegal . . . . Further the undisputed facts . . . show that she never told [Pacific Dental] she contended that the new policy would result in 'negligent or incompetent treatment' nor that it would 'discourage necessary treatment'."

II. DISCUSSION

Figueroa contends that the trial court erred in granting summary judgment because her disagreement with Pacific Dental with respect to the regular prophylaxis treatments was " 'protected activity' " under the Business and Professions Code.

"Because plaintiff appealed from the trial court's order granting defendant summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action. [Citation.] In this action, therefore, we must determine whether defendant has shown that plaintiff has not established a prima facie case . . . , 'a showing that would forecast the inevitability of a nonsuit' in defendant's favor. [Citation.] 'If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.' [Citation.] In performing our de novo review, we view the evidence in the light most favorable to plaintiff as the losing party. [Citation.] In this case, we liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 64.)

The cause of action for termination of employment in violation of public policy originated with *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167 (*Tameny*). The claim recognizes that "while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1094, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6.) "[D]espite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee." (*Id.* at p. 1090.) In drawing this line, the Supreme Court has held that the public policy "must be based on policies 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . .' " (*Silo v. CHW Medical Foundation* (2002) 27 Cal.4th 1097, 1104.)

"To support such a [*Tameny*] cause of action, the [public] policy in question must satisfy four requirements: 'First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be "public" in the sense that it "inures to

the benefit of the public" rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial." ' " (*Ross v. Raging Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 932.) "Th[ese] limitation[s] recognize[] an employer's general discretion to discharge an at-will employee without cause under [Labor Code] section 2922, and best serve[] the Legislature's goal to give law-abiding employers broad discretion in making managerial decisions." (*Green v. Ralee Engineering Co., supra,* 19 Cal.4th at pp. 79–80.)

Figueroa contends, and Pacific Dental does not dispute, that a fundamental public policy enforceable through a *Tameny* claim is contained in the Business and Profession Code sections defining "unprofessional conduct" by a dentist.[3] Under section 1670, a dentist who engages in "unprofessional conduct" is subject to disciplinary measures, including license revocation, reprimand, and probation. Section 1680 lists a wide variety of conduct that constitutes unprofessional dentistry, including "[t]he aiding or abetting of a licensed dentist, . . . or registered dental hygienist . . . to practice dentistry in a negligent or incompetent manner" (*id.*, subd. (y)) and "the discharge of an employee primarily based on the employee's attempt to comply with the provisions of this chapter or to aid in the compliance" (*id.*, subd. (q)). Section 1685 states, "In addition to other acts constituting unprofessional conduct under this chapter, it is unprofessional conduct for a person licensed under this chapter to require, either directly or through an office policy, or knowingly permit the delivery of dental care that discourages necessary treatment or permits clearly excessive treatment, incompetent treatment, grossly negligent treatment, repeated negligent acts, or unnecessary treatment, as determined by the standard of practice in the community."

[3] Because Pacific Dental does not dispute Figueroa's reliance on these statutes, we assume without deciding that they express the type of fundamental public policy adequate to support a *Tameny* claim under the standards set out in *Ross v. Raging Wire Telecommunications, Inc., supra,* 42 Cal.4th at p. 932.

In order to claim the protection of section 1680, subdivision (q), which precludes the discipline of an employee as a result of his or her attempt to comply with the statutes governing dental practice, Figueroa must locate a provision of the Business and Professions Code whose violation was threatened by the change to 50-minute cleaning appointments. Figueroa has not pointed us to any state statutes or regulations specifically governing the timing or components of dental prophylaxis. Rather, the only provisions she has called to our attention are those quoted above, which preclude generally the "practice [of] dentistry in a negligent or incompetent manner" (§ 1680, subd. (y)) and "the delivery of dental care that discourages necessary treatment or permits clearly excessive treatment, incompetent treatment, grossly negligent treatment, repeated negligent acts, or unnecessary treatment, as determined by the standard of practice in the community." (§ 1685.) It is these statutes we will use to measure the public policy at issue in this action.

We agree with the trial court's conclusion that Pacific Dental successfully demonstrated Figueroa could not make a prima facie case that the controversy regarding cleaning time concerned negligent or incompetent treatment, as required to violate these statutory provisions. The testimony of Pacific Dental's witnesses established that an adequate cleaning for most patients could be performed in 50 minutes and that a 50-minute cleaning was the norm in the majority of dental offices in San Francisco. The fact that the ADA does not require cleaning below the gum line as a regular feature of prophylaxis provides fairly conclusive evidence that Pacific Dental's new practice, whatever its merits, did not constitute negligent or incompetent treatment. Further, Figueroa implicitly acknowledged that prophylaxis as defined by the ADA could be performed in 50 minutes, since she labeled her 50-minute appointments an "ADA prophylaxis." For patients requiring more extensive cleaning, Pacific Dental dentists reserved the option of scheduling a 60-minute treatment or a second 50-minute treatment.

Figueroa believed either that patients routinely should be given the Delta Dental version of prophylaxis, including cleaning below the gum line, or that, at a minimum,

they should be informed that their treatment did not include this cleaning.[4] While this difference of opinion between Figueroa and the dentists clearly concerned the nature of dental care provided at Pacific Dental, Figueroa provided no evidence suggesting it was a dispute over the provision of reasonable versus "negligent or incompetent" care. Rather, it was a good faith dispute about the appropriate components of routine preventative care and patient communication, with both sides inside the bounds of reasonable care.[5]

Figueroa acknowledges she must "prove that she attempted to comply or aid in the compliance with the provisions of [the Business and Professions Code] and that she was discharged because of that." In making her arguments, however, she ignores the specific language of the Code, contending that "by statute, California specifically protects its [dental hygienists] who support better patient treatment." Such a broad construction of the *Tameny* cause of action in these circumstances is unwarranted, either by the language of the Business and Professions Code or the policies underlying a *Tameny* claim. The Business and Professions Code does not require dentists to provide a particular level or type of care, other than to avoid negligent and incompetent care. It leaves to the discretion of individual dental health professionals to select among the range of reasonable treatment options. As this case illustrates, for example, the ADA believes cleaning below the gum line is not a necessary component of routine cleaning, while

[4] Although there were references in Figueroa's deposition to impropriety in billing Delta Dental for prophylaxis when only an ADA cleaning was performed, we find insufficient evidence on this issue to create a triable issue that Pacific Dental was engaged in any type of improper billing practice. In any event, Figueroa denied that she believed Pacific Dental was "defrauding" Delta Dental by following the ADA definition.

[5] Figueroa contends a claim of malpractice is supported by her written employment warning, in which one of the office's dentists characterized her conduct as writing "incriminating" notes in the patient files. In his declaration, the dentist called that a poor choice of words. Regardless, it is clear from the record that Figueroa never contended or believed the office was committing malpractice. The mere use of the word "incriminating" to refer to her notations does not constitute substantial evidence to the contrary.

Delta Dental takes, or at least took, a different position.[6] Because the statutes refer only to conduct falling below the level of competent, there is no basis in the Business and Professions Code for protecting employee advocacy of "better patient treatment" that is not concerned with avoiding malpractice.

Nor would it serve the purposes of *Tameny* to create such a right. A *Tameny* claim is not intended to restrict employers' "broad discretion in making managerial decisions" (*Green v. Ralee Engineering Co., supra,* 19 Cal.4th at pp. 79–80) or to turn "ordinary disputes between employer and employee" into lawsuits (*Gantt v. Sentry Insurance, supra,* 1 Cal.4th at p. 1090). For that reason, we are required to confine the cause of action to the public policy concern actually articulated by the Legislature: the avoidance of dental malpractice. So long as it is within the range of the standard of practice in the community, the precise level of care provided by a particular dental office is of no statutory concern. As a result, disputes between the proprietors of the office and their staff concerning this topic do not constitute protected activity, and the proprietors may lawfully terminate at-will employees on the basis of their resistance to an office's chosen standard of practice. As this case illustrates, any other rule would undermine dentists' control over their practices by permitting their employees to select their own methods and level of treatment.

Figueroa also argues that her "good faith belief in her actions qualifies her for protection." (See, e.g., *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1043 [employee is protected when refusing to engage in conduct reasonably believed to violate Fair Employment and Housing Act, even if the conduct is ultimately found lawful].) There is no dispute Figueroa sincerely believed that Pacific Dental should have continued to provide 60-minute prophylaxis treatments and/or informed its patients of the change. Under *Yanowitz,* however, what was required was not merely a good faith belief in her

[6] In deposition, Pacific Dental's counsel suggested that Delta Dental has revised its view and adopted the position of the ADA. While Delta Dental's current position is immaterial to resolution of this appeal, its past position clearly illustrates the range of professional opinion.

position, but a good faith belief that the conduct she resisted violated public policy. As discussed above, there is no evidence Figueroa believed Pacific Dental would be providing care that violated the Business and Professions Code—that is, negligent or incompetent care—if it did not adopt her position. Accordingly, her good faith advocacy of a higher standard did not constitute protected activity.

Finally, Figueroa argues that her conduct was protected because she believed she would not be able to complete the prescribed procedures in 50 minutes. Pacific Dental, however, provided uncontradicted evidence that other dental offices in San Francisco regularly provided 50-minute prophylaxis. In light of this standard of practice in the community, Figueroa was not entitled to protection under *Tameny* merely because she was unable or unwilling to comply with standard procedures.

Because we conclude that Figueroa failed to create a triable issue of fact regarding the protected nature of her conduct, we do not consider the other issues raised by the parties.

III. DISPOSITION

The judgment of the trial court is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Graham, J.*

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.